Islands-In Banco. April Term, 1888. S. K. KAHAI AND KALULU (K.) VS.

> MARY SYLVA ROSE. Trespass on Case.

REFORE JUDD, C. J., M'CULLY J., PERSION J., BICKESTON J. AND DOLE J. Opinion of the Court by BICKERTON J.

This matter comes here on exceptions to the rulings of the Chief Justice at the January term, 1888.

The plaintiff claimed of the defendant \$500 damages, for obstructing and closing a right of way. At the close of plaintiff's case, defendant's coupsel moved that the Court do instruct the jury to bring in a verdict for the defendant, claiming that the Commissioners of Private Ways and Water Rights had exclusive jurisdiction to determine controversies as to private ways and that defendant's denial of the right of way claimed, ousted the Court of its jurisdiction to determine said right or to assess damages for its obstruction, until the right had been first established before said Commission-

The Court declined to instruct the jury as above requested, and instructed the jury that if they found a right of way to exist, as claimed by plaintiffs, and that it was obstructed by defendant, they might find damages for the plaintiffs, to which instruction and refusal to instruct, defendant duly excepted. After defendant had offered certain evidence, tending to show that there was no right of way as claimed, and the Court had charged the jury, the jury found a verdict for plaintiffs with eighteen dollars damages.

It appears by deed, dated 17th of August, 1885, and recorded on the same date, that one Kaaahu (w.) sold and conveyed to defendant a certain piece of land situated at Kamakela, Honolalu, described by metes and bounds, and also a right of way eight feet wide along and adjoining the south side of said premises. That the same person, Kaaahu (w.), sold and conveyed by deed, dated 13th May, 1887, recorded 27th May, 1887, to defendant a piece of land adjoining the said land of plaintiffs described by metes and bounds, there being a condition in the deed that defendant shall sell a right of way to the people living mauka of this land if they desire it, and that said right

of way shall not exceed eight feet wide and shall run straight along the side of plaintiffs' lot, through to the mauka side of this lot.

This certainly would seem to refer to the extension of the right of way already granted to plaintiffs by their deed. Both plaintiffs and defendant are the grantees of the same grantor, and the plaintiffs' deed being of recall the defendant bad notice of the said C. W. Clark.

Dwight, before the Chief Justice, on the 3d day of August, 1883, but was not recorded until the 9th day of December, 1887, after the death of C. W. Clark.

It is contended on behalf of the defendants, that the agreement is not valid on the ground that it was not recorded during the lifetime of the said C. W. Clark.

Section 1263 of the Civil Code prosale of this right of way to plaintiffs sale of the right of the south therein mentioned "agreements of the south therein mentioned agreements of the south therein mentioned the south line of their lot: it was and is an es- adoption shall, in order to their valtablished and vested right purchased | idity, be recorded in the office of the by them and set forth in their deed. Registrar of Conveyances, in default Kaaahu (w.) could not sell and con- of which no such instrument shall vey to defendant what she nad al- be binding to the detriment of third ready parted with. There was no parties, or conclusive upon their right for the Commissioners to estab- rights and interests." lish, for it was already established, and they, the Commissioners, could not have assessed damages for the obstruction of this right of way which fore declare that the agreement of was the only object of this action, viz: to recover damages.

We do not consider that the statsioners of Private Ways.

The question as to the Commissioners of Private Ways having exclusive jurisdiction over causes of this nature, is controlled by the case of Stone vs. W. F. Allen, 3 Hawn, 621 and authorities there cited. In that case the Court say "that another tribunal provided for by statute has merely concurrent jurisdiction, unless there be express words or words from which it may be implied that it was intended to be exclusive." Also, "So if a statute gives a remedy in the affirmative (without a negative expressed or implied; for a matter which was actionable by the common law, the party may sue at common law." I Comyn's Digest Stat. C.

In Chapter 69 Laws 1886, Sec. 3, we find the following: "Any persons interested, or the Government may apply for the settlement of any rights involved hereunder, etc.

The above quoted phrase is significant of the special function of this Board.

We have remarked that it is not a tribunal for the recovery of damages. Its function is to determine and award rights for the future. It may award a right of way from necessity when there had been no breach of right.

It may determine the rights of a whole neighborhood. Here interest will qualify a person to petition for the action of the Board. These considerations support the view that the Courts of law are not ousted of their jurisdiction in any respect by the constitution of a Board which for the most part has a province not within the juristiction of the Court.

We therefore hold that the Commisioners of Private Ways have not exclusive jurisdiction over causes of

The exceptions are overruled. W. C. Achi for plaintiffs; W. A. Kinney for defendant.

Honolulu, April 21, 1888.

In the Supreme Court of the Hawaiian In the Supreme Court of the Hawaiian Islands. In Banco. April Term, 1888-

> HARRIET BLACK AND J. H. BLACK HER HUSBAND AND JAMES G. DWIGHT, A MINOR, VS. S. N. CASTLE, J. B. ATH-ERTON AND GEORGE P. CASTLE AND CHARLES H. CLARK AND ELLEN P.

Submission without Action.

ERTON AND DOLE J. J., Opinion of the Court by PRESTON J.

This is a submission under Sections 1140, 1141, 1142 and 1143 of the Civil Code.

The submission states that on the 16th day of June, 1888, an agreement was made and signed by C. W. Clark as adopting parent, and Harriet Dwight, widow, the mother of the plaintiff, J. G. Dwight. That on the 13th of July, 1883, the said Harriet Dwight intermarried with one Alexander McGregor, and that during such coverture she acknowledged the execution of the said agreement, before the Chief Justice, and was afterwards divorced and married the plaintiff, J. H. Black. That at the time of the execution of the said agreement and up to the time of his death, the said C. W. Clark was a married man, and his wife was not made a party to the said agreement. That on the 4th day of June, 1867, the said C. W. Clark took out a life policy in "The New England Mutual Insurance Company," for one thousand dollars payable "to his surviving children." That the said C. W. Clark died on the 24th day of October, 1887, leaving a will, devising and bequeathing alt his estate to his wife, and naming her as executrix, and that said will had been admitted to probate. That said policy had been paid into the hands of Castle & Cooke, the Insurance Company's agents, which firm was composed of the defendants, Castle, Atherton and G. P. Castle, and the parties submitted the following questions of law to the Court:

"Is the adoption agreement valid in law? and under the same is the said James Gilbert Dwight entitled to a like share with any surviving child or children of the said C. W. Clark, born in lawful wedlock?"

BY THE COURT.-It appears by the adoption agreement annexed to the submission, that it was acknowledged by C. W. Clark and Harriet

We think that the contention made by the counsel on behalf of the defendants is a sound one, and thereadoption referred to in the submission, not having been recorded during the lifetime of the said C. W. ute contemplated cases of this nature | Clark, is invalid in law, and consebeing brought before the Commis- quently the plaintiff, J. G. Dwight, is not entitled, as one of the "surviving children." of C. W. Clark, to any share in the said Insurance

> money. Having thus decided that the adoption is invalid, it is unnecessary to pass upon the other points raised by counsel for the parties.

> Judgment must be entered for the defendants with costs.

A. C. Smith for plaintiffs; A. Rosa for defendants.

Honolulu, April 21, 1888.

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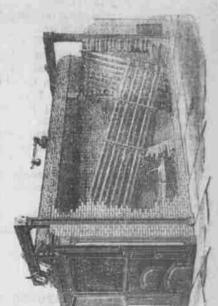
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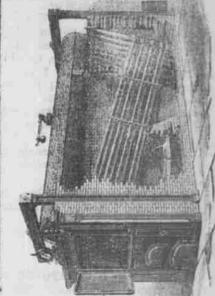
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